

RANDY L. POWER D/B/A PROCOMM

IBLA 89-119

Decided April 24, 1990

Appeal from a decision of the Phoenix Resource Area Manager, Bureau of Land Management, establishing rental rate for communication site right-of-way AR-023686.

Affirmed.

1. Appraisals--Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally

A Bureau of Land Management appraisal of fair market value will not be set aside for failure to include five comparable electronic communication sites alleged to afford similar coverage to the appraised site, where no alternative appraisal or evidence is submitted to demonstrate that the allegedly comparable sites afford similar coverage, access, power, and terms to the subject site, or that inclusion of the five allegedly comparable sites would support a different conclusion than that reached by the Bureau of Land Management.

APPEARANCES: Randy L. Power, d.b.a. ProComm, Phoenix, Arizona, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Randy L. Power, d.b.a. ProComm, has appealed from a reappraisal decision by the Phoenix Resource Area Manager, Bureau of Land Management (BLM), increasing the rental rate for communication site right-of-way AR-023686. BLM's October 28, 1988, decision increased the rental rate from \$1,800 per annum to "\$6,000.00 for a one-year period beginning January 1, 1989."

The communication site right-of-way was originally granted to Tanner Brothers Contracting Company on February 4, 1960, for 50 years (at an annual rental of \$50) pursuant to the Act of March 4, 1911, 36 Stat. 1253, as amended, 43 U.S.C. § 961 (1976) (repealed effective Oct. 21, 1976, by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793 (1976)). The right-of-way affects 0.23 acres of land situated in the NE¼ sec. 28 (now tract 37), T. 3 N, R. 3 W., Gila and Salt River Meridian, Maricopa County, Arizona. BLM approved Tanner Brothers' assignment of the subject communications site right-of-way to Goettl Bros., Metal Products, Inc., on October 6, 1960. BLM recognized the new lessee's change of name to Goettl Air Conditioning, Inc., on April 20, 1983, and approved a subsequent assignment of the right-of-way to appellant by decision dated March 26, 1986. On June 23, 1986, the

right-of-way grant was amended pursuant to Title V of FLPMA, to authorize the construction of a 120- by 140-foot free-standing tower and two 8- by 20-foot buildings.

BLM's October 28, 1988, decision stated that the rental rate for the subject right-of-way had been reviewed in accordance with regulations at 43 CFR Part 2800, and, as a result, a \$6,000 rental had been found to constitute fair market annual value after consideration of values obtained for comparable properties. The BLM decision relied on a report dated May 24, 1988, entitled "Appraisal Report for Rental of Electronic Communication Sites upon the White Tank Mountains West of Phoenix."

The stated purpose of the appraisal report was to estimate fair market rental for two-way communication facilities and microwave facilities on lands in the White Tank Mountains. According to the report, the mountains are readily useable as a relay site capable of passing signals to the east to the western Phoenix metropolitan area and across the desert plains toward the western side of the State, and in other directions as well. The White Tank Mountains communications site, at the time of the 1988 appraisal, served as a "location for communication sites and [was] intensively used as such." Id. at 10.

To determine the fair market rental value of two-way communication facilities rights-of-way, the appraisal report identified five factors affecting rental value: coverage, 1/ agreement date, 2/ access, 3/ electric power, 4/ and terms of lease. 5/ The appraisal report states that BLM examined 60 communication site lease transactions conducted in Arizona and neighboring states to ascertain market trends. Id. at 16. The report summarized 29 lease transactions tending to establish value limits for the White Tank Mountains drawn from locations in Arizona, New Mexico, Colorado, California, Texas, and Nevada. The rentals for the selected sites ranged from \$900 to 120,000 per year. Differences in rental values were attributable to differences in coverage, location, date, application, and intensity of use.

1/ Coverage "[c]onsiders the population, highway traffic and economics of the area that can be reached from the site. Or in point-to-point communication, the distance and line of sight to other strategic sites in the system" (Appraisal at 14).

2/ Agreement date: "This factor will reflect general trends in rental rates from the date at which the current rental on the comparables was established to the date of the appraisal." Id.

3/ Access "[c]onsiders the type and quality of access to the site for construction, maintenance and security. In some places road access is only seasonal, making necessary helicopter access or live-in maintenance personnel a high cost." Id.

4/ Electric power "[e]xamines the availability, proximity and dependability of power at the site." Id.

5/ Under terms of the lease, "[t]he length and provisions of the agreement are examined for comparison, noting the duration of the lease, restrictions, obligations, and rental renewal provisions." Id.

In screening for leases most similar to the White Tank Mountains site, BLM eliminated 8 of the 29 comparables considered because they were too distant from population centers or too old. At the upper limit of value, BLM excluded two out-of-state agreements with a rental of \$120,000 and \$16,000. Id. The list was finally reduced to 15 comparable sites in California, Arizona, Texas, Colorado, and Nevada, found to compare to the subject site considering agreement date, rent, access, electric power, and coverage (as a function of size of the surrounding urban market and population). Id. at 19-21. Rental for the 15 sites ranged from \$2,500 to \$17,056 per year.

BLM categorized sites renting in the \$2,500 range which were more distant from urban centers to be inferior to the subject. Id. The appraisal then excluded several properties because the rents in effect were not representative of the market (leases #7-#15) as well as a site found to be too old to be a valid comparable (lease #4). One site having a rental of \$4,800 was found to be inferior because it lacked winter access. Other sites were inferior because they lacked access and power. Id. A second site renting at \$4,800 was found to be not comparable because the rent was acknowledged by the parties to the transaction to be below market (lease #5). Id. A third site offering similar coverage and access to the subject site was considered undervalued because it was out-of-date.

BLM identified three sites on Sacaton Peak south of Chandler, Arizona, to be most comparable to the subject lease. Site rentals ranged from \$7,800 to \$12,420 per year. The disparate annual rentals are attributable to the lessor's method of calculating rent. All three sites, BLM explained, have an initial fee of \$6,000 annually for commercial use, but there is an additional assessment made for the number of transmitters on each lessee. BLM found that the base rental charge of \$6,000 arrived at fits well between lease #6, renting at \$4,800, which is inferior to the subject, and lease #7 overlooking El Paso, Texas, a superior site, renting at \$7,130. Id.

Appellant maintains that BLM's appraisal is deficient because, of the 15 sites examined, only two afforded coverage to the approximate geographical area of the White Tank Mountains, and these two sites did not fairly represent Phoenix market values (Statement of Reasons (SOR) at 1). The appraisal is additionally flawed, appellant contends, because it failed to take into consideration five additional sites at Towers Mountain, Wildflower Mountain, Mt. Ord, Pinal Mountain, and Shaw Butte. Appellant contends these sites command the same geographical coverage as the White Tank Mountains. Id. Appellant asserts that "[i]f a fair and accurate comparison is to be done for evaluating the worth of a site in this geographical area, certainly all existing sites that have similar coverage should be evaluated." Because this was not done, appellant charges "the report does not fairly represent what the Phoenix market will bear for site rental costs." Id.

This Board has consistently held that an appraisal of the market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal. Blue Sky Communications, Inc.,

110 IBLA 213, 214 (1989); Chalfont Communications, 108 IBLA 195, 196 (1989); Denver & Rio Grande Western Railroad, 101 IBLA 252, 254 (1988). Here, BLM employed the comparable-lease method of appraisal, which is the preferred method for determining the fair market value of nonlinear rights-of-way, including communication sites. Harvey Singleton, 101 IBLA 248, 250 (1988).

[1] The record reveals that of the 15 sites examined by BLM's appraisal, 5, rather than 2, were in the vicinity of the City of Phoenix: Lease #5 (South Mountain), lease #8 (Sacaton Peak), lease #10 (Sacaton Peak), lease #13 (Sacaton Peak), and lease #15 (Estrella Mountains). The annual rents at the respective sites were \$4,800, \$7,800, \$10,400, \$12,420, and \$17,056. Information supplied by the City of Phoenix led to elimination of lease #5 because it was rented at a rate below market.

The site embraced by lease #5 accommodates 17 users on South Mountain, immediately south of the city of Phoenix. The lessor is the City of Phoenix. Comparing the subject site to lease #5 shows that lease #5 offers similar access and coverage. The rental of \$6,000 for the leases on Sacaton Peak and the \$17,056 annual rental paid for the site atop the Estrella Mountains, however, supports BLM's finding that the rent paid at South Mountain was below fair market value. Appellant has not submitted any evidence to show that the \$4,800 annual rental for lease #5 is not below market.

Appellant has alleged that the BLM appraisal was inadequate because it failed to include the five comparable sites he listed. He has, however, neither submitted an alternative appraisal, nor offered evidence to suggest that the inclusion of the five alternative sites he favors would support a different conclusion than that reached using the data compiled by BLM. Nor has he submitted any evidence to substantiate his claim that the five sites are similar in coverage, access, power, agreement date, and terms to the subject site. It is incumbent upon appellant not merely to allege error, but to demonstrate error through submission of proof by a preponderance of the evidence. Harvey Singleton, *supra*; Denver & Rio Grande Western Railroad, *supra*. See generally, Phyllis E. Lewis, 113 IBLA 376 (1990). Appellant has not carried that burden in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge